APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed April 2, 2007]

No. 05-55490
D.C. No. CV-04-00253-GLT

MEERA SAMANTA,
Plaintiff-Appellant,

v.

OLINA HARWER, MD,
Defendant,

and

BARR LABORATORIES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Central District of California (Santa Ana).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California (Santa Ana) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is VACATED and REMANDED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed APR 2, 2007]

No. 05-55490
D.C. No. CV-04-00253-GLT

MEERA SAMANTA,
Plaintiff-Appellant,

v.

OLINA HARWER, MD,
Defendant,

and

BARR LABORATORIES, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Submitted March 7, 2007**
Pasadena, California

MEMORANDUM*

Before: RYMER, WARDLAW, and M. SMITH, *Circuit Judges.*

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Plaintiff Meera Samanta appeals the district court's judgment in favor of defendant Barr Laboratories, Inc. (Barr). Samanta argues that the district court erroneously determined that defendant Olina Harwer, M.D. (Dr. Harwer) was fraudulently joined and therefore incorrectly found that removal was appropriate. We agree.

We have jurisdiction under 28 U.S.C. § 1291, and "review the district court's legal determination as to the propriety of removal, like all questions of subject-matter jurisdiction, *de novo*." *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1215 (9th Cir. 2000) (citations omitted).

Because Samanta and Dr. Harwer's California residency prevents complete diversity, the district court's power to exercise subject matter jurisdiction depends on a finding that Dr. Harwer was fraudulently joined. *See Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). Where a defendant proves fraudulent joinder, the presence of a resident defendant will not defeat diversity jurisdiction, and a remand on jurisdictional grounds is not required. *Id.* "Fraudulent joinder is a term of art. If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent." *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). The removing defendant bears the burden of proving that removal is appropriate and is entitled to present facts showing that the joinder is fraudulent. *Id.*

The district court misapplied the fraudulent joinder test. The key inquiry is whether Samanta's complaint put forward any viable theory against Dr. Harwer. Samanta's complaint pleads each element of a cause of action for medical negligence and lack of informed consent against Dr. Harwer. Furthermore, Barr does not offer any argument or facts challenging the viability of these claims. Since Barr did not meet its burden of proving that Dr. Harwer was fraudulently

joined, removal was inappropriate. Accordingly, we vacate the district court's judgment and remand to the district court with instructions that it remand the case to state court for lack of jurisdiction or diversity jurisdiction.

VACATED AND REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Filed March 22, 2005]
Complaint Filed: 11/13/03

Case No. SAC V04-0253 GLT (ANx)

MEERA SAMANTA, Individually, and as successors in interest to the estate of PARINEETA SAMANTA,
Plaintiff,

vs.

OLINA HARWER, M.D.; BARR LABORATORIES, INC.; and DOES 1 through 100, inclusive,
Defendants.

The Honorable Gary L. Taylor, Judge

JUDGMENT

Defendant Barr Laboratories, Inc. ("Barr") filed its Motion for Summary Judgment on February 18, 2005. Plaintiff filed her Opposition on February 28, 2005. Barr filed its Reply on March 7, 2005. On March 10, 2005, the Honorable Gary L. Taylor, District Judge Presiding, considered all of the briefs, and the evidence presented, if any, of Barr and Plaintiff and issued an order granting Barr's Motion for Summary Judgment.

The evidence presented having been fully considered, the issues having been fully considered and a decision having been duly rendered, IT IS ORDERED AND ADJUDGED that the Plaintiff take nothing, that the action be dismissed

with prejudice on the merits and that Defendant Barr recover its costs.

DATED: March 21, 2005

/s/ GARY L. TAYLOR
THE HONORABLE GARY L. TAYLOR,
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

[Filed MAR 10, 2005]

Case No. SA CV 04-253-GLT (ANx)

MEERA SAMANTA,

Plaintiff,

vs.

OLINA HARWER *et al.*,

Defendants.

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

Defendant's motion for summary judgment is GRANTED.

I. BACKGROUND

Plaintiff sued Defendant Barr Laboratories asserting her deceased daughter, Parineeta Samanta, passed away in India from a pulmonary embolism. Plaintiff alleges the pulmonary embolism was caused by an oral contraceptive manufactured by Defendant. Plaintiff brings claims for strict products liability, failure to warn, and negligence.

Defendant now moves for summary judgment on all three claims.

II. DISCUSSION

Summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Under California law,[1] proximate cause is an element of each of Plaintiff's claims. *Thomas v. Lusk*, 27 Cal. App. 4th 1709, 1717 n.3 (Ct. App. 1994); *Powell v. Standard Brands Paint Co.*, 166 Cal. App. 3d 357, 363 (Ct. App. 1985). In a personal injury action, proximate cause "must be proven within a reasonable medical probability based upon competent expert testimony." *Jones v. Ortho Pharm. Corp.*, 163 Cal. App. 3d 396, 402-03 (Ct. App. 1985).

Here, the date for designating experts has passed, and Plaintiff has no expert. Without expert testimony, Plaintiff cannot establish proximate cause—an element of each of her claims.

Plaintiff has the burden to present evidence showing an adequate causal connection. Plaintiff's opposition asserts only conjecture, not evidence. The case cannot proceed based on conjecture.

Plaintiff has had every opportunity to marshal her case. For example, the Court (1) held a status conference to warn Plaintiff of possible dismissal, (Ct.'s Aug. 30, 2004 Order), (2) provided Plaintiff time to bring in an attorney, (Ct.'s Aug. 30, 2004 Order), (3) excused Plaintiff's non-compliance with the Court's Order to participate in discovery, (Ct.'s Aug. 30, 2004 Order), and (4) granted Plaintiff's request to extend discovery, (Ct.'s Nov. 16, 2004 Order). Repeated delays and opportunities have been given to Plaintiff to develop her case.

The Court is very sympathetic about Plaintiff's loss. However, Plaintiff has no proof of causation. Defendant's moving brief is meritorious. The Court GRANTS Defendant's motion for summary judgment.

In an effort to avoid summary judgment, Plaintiff has filed an ex parte application to review the Court's earlier order

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[1] California law applies in this diversity action.

permitting removal of this case to the federal court. Viewed as a motion for reconsideration of the Court's April 2004, minute order, the application is not timely, and no changed facts or new evidence is shown. The fact that Doctor Harwer may have been involved in an arbitration proceeding with Plaintiff does not mean she is a party to this case. The lack of a triable issue in this case will not be avoided by a remand to state court.

III. DISPOSITION

Defendant's motion for summary judgment is GRANTED. The March 14, 2005, hearing on this matter is ordered off-calendar. Defendant shall submit to the Court a short form of a proposed Judgment.

DATED: March 10, 2005

/s/ Gary L. Taylor
GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

[Filed APR 28, 2004]

Case No. SA CV 04-0253 GLT (ANx)
Date: April 23, 2004
Title: *Merra Samanta v. Olina Harwer, M.D., et al.*

PRESENT:

HON. Gary L. Taylor JUDGE

Lisa Bredahl	None Present
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None Present	None Present

PROCEEDINGS: ORDER VACATING ORDER TO SHOW CAUSE [In Chambers]

On March 18, 2004, the Court ordered Defendant Barr Laboratories to show cause regarding the appropriateness of removal while named Defendant Dr. Olina Harwer remains unserved. On April 16, 2004, Defendant Barr Laboratories filed a response, indicating Plaintiff has never served Defendant Dr. Harwer nor requested a summons for service from the state court or this Court. At this stage, it appears Defendant Dr. Harwer is joined fraudulently and removal is appropriate. *Herzig v. Twentieth-Century Fox Film Corp.*, 129 F.Supp. 845, 848 (S.D. Cal. 1955) ("[W]here it appears that the plaintiff has no intention of serving the resident defen-

dants and attempting to recover judgment against them, the Court is justified in concluding, as a matter of fact, that they were joined in bad faith for the sole purpose of preventing Federal jurisdiction, and that, hence, the joinder is fraudulent.").

The Court's March 18 order to show cause is VACATED. If appropriate at a future time, Plaintiff may make a showing of the good faith joinder of Dr. Harwer.

Initials of Deputy Clerk LB

APPENDIX F

UNITED STATES CODE ANNOTATED

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 85—DISTRICT COURTS; JURISDICTION

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this *title*—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

APPENDIX G

UNITED STATES CODE ANNOTATED

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

APPENDIX H

UNITED STATES CODE ANNOTATED

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

* * * *

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

APPENDIX I

UNITED STATES CODE ANNOTATED

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Filed MAR 4, 2004]

Case No. SACV04-0253 GLT (ANx)

MERRA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA,

Plaintiff,

vs.

OLINA HARWER, M.D.; BARR LABORATORIES, INC.; and DOES 1 through 100, inclusive,

Defendants.

NOTICE OF REMOVAL OF CIVIL ACTION TO UNITED STATES DISTRICT COURT UNDER 28 U.S.C. § 1441(b) (DIVERSITY)

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA:

Defendant Barr Laboratories, Inc., through its attorneys, Drinker Biddle & Reath LLP, hereby removes this action from the Superior Court of the State of California for the County of Orange, Central Justice Center, to the United States District Court for the Central District of California on the following grounds:

1. On November 13, 2003, plaintiff commenced an action in the Superior Court of the State of California for the County of Orange, captioned *Meera Samanta, individually, and as successors in interest to the estate of Parineeta*

Samanta, vs. Olina Harwer, MD., Barr Laboratories, Inc., and Does 1 through 100, Inclusive, Case No. 03CC13673.

2. To the best of its knowledge, information, and belief, Barr Laboratories, Inc. (herein "Barr") first received a copy of the complaint and summons on January 12, 2004. (See Declaration of Siobhan Cullen, counsel for Barr (herein "Cullen Declaration"), attached as Exhibit A, ¶ 2.) Pursuant to 28 U.S.C. § 1446(a), a true and correct copy of the proof of service of the summons and complaint, which constitute the only "process, pleadings, and orders served upon" Barr, is attached hereto as Exhibit B.

3. On February 10, 2004, Barr filed its answer to the complaint (attached hereto as Exhibit C).

4. On March 4, 2004, Barr timely filed this removal, which was within thirty days after receipt of information from which it was first ascertainable that this case was one which was removable, as required by 28 U.S.C. § 1446(b).

5. As detailed below, this is a civil action of which this Court has original jurisdiction under 28 U.S.C. § 1332(a), in that the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and it is between citizens of different states. Accordingly, this action may be removed to this Court by Barr pursuant to 28 U.S.C. § 1441(b).

6. According to plaintiff's complaint, decedent Parineeta Samanta was a resident of the State of California.

7. According to plaintiff's complaint, plaintiff Meera Samanta, individually and as successor in interest to the Estate of Parineeta Samanta, is a resident of the State of California. (Complaint, Exhibit B, ¶ 1.)

8. Barr Laboratories, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York.

9. Plaintiff's complaint states that Olina Harwer, M.D. ("Dr. Harwer") is licensed to practice in the State of California and provided care to decedent at her offices in Orange County, California. (Complaint, Exhibit B, ¶ 1.)

10. On February 24, 2004, counsel for Barr checked the docket in the state court action and learned that the plaintiff had not served Dr. Harwer, despite the requirements of Rule 201.7(b) of the California Rules of Court, which provides: "The complaint must be served on all named defendants and proofs of service on those defendants must be filed with the court within 60 days after the filing of the complaint." *(See* Cullen Declaration, Exhibit A, ¶ 3.)

12. To the best of Barr's knowledge, information and belief, as of this date plaintiff still has not served Dr. Harwer, the only resident of California named as a defendant in plaintiff's complaint. *Id.* at ¶ 4.

13. Plaintiff did not file an application for a court order extending the time to serve a pleading, as provided by the California Rules of Court, Rule 201.7(e), nor is there any other evidence in the docket or elsewhere that plaintiff intends to serve Dr. Harwer. (*See* Cullen Declaration, Exhibit A, ¶ 5.)

14. Further, the court on its own motion has not extended or otherwise modified the California Rules of Court, Rule 201.7 requirement that the complaint must be served on all named defendants and proofs of service on those defendants must be filed within 60 days after the filing of the complaint.

15. In checking the docket of the state court action on or about February 24, 2004, counsel for Barr also learned for the first time that Dr. Harwer has never answered plaintiff's complaint. *Id.*, ¶ 6.

16. Barr Laboratories, Inc., expected service of a responsive pleading by Dr. Harwer on approximately February 13,

which would have been approximately 30 days from the last day on which plaintiff could have timely served Dr. Harwer, plus two days for mailing. Not until February 24, 2004, when counsel for Barr Laboratories, Inc., consulted the state court docket and learned that Dr. Harwer has never filed a responsive pleading, did Barr first ascertain that the case had become removable. It now is evident that Dr. Harwer has never been served, plaintiff does not intend to proceed against her, and she has been joined fraudulently to defeat diversity. Accordingly, this Notice of Removal is timely.

17. Complete diversity exists pursuant to 28 U.S.C. § 1441(b). 28 U.S.C. § 1441(b) provides that an action shall be removable "if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). Therefore, the local defendant exception to removal only applies, as the statute states, to defendants who are "properly joined and served."

18. Dr. Harwer has neither been properly joined, nor has she been served. The local defendant exception is inapplicable, and removal is proper. *See, e.g., McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001) (stating "[w]here there is complete diversity of citizenship, . . . the inclusion of an unserved resident does not defeat removal under 28 U.S.C. § 1441(b)."); *Republic Western Insurance Co. v. International Insurance Co.*, 765 F. Supp. 628, 629 (N.D. Cal. 1991) (stating that in cases where complete diversity exists, "a resident defendant who has not been served may be ignored in determining removability") (quoting 14B C Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 3723 at 341 (2d Ed. 1985). *See also* U.S. District Court for the Southern District of California Order Denying Motion to Remand, filed July 23, 2003, in *Haberer v. Metabolife International, Inc.*, Case No. 03CV5424 BTM (AJB), p. 4-5, attached hereto as Exhibit D. *Cf. Preaseau v. Prudential Insurance Co. of America*, 591 F.2d 74 (9th Cir. 1979)

(refusing to permit removal although resident defendant joined in good faith had not been served).

19. The presence of Does 1 through 100 cannot defeat diversity, as 28 U.S.C. § 1441(a) provides: "For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded." To the best of Barr's knowledge, information and belief, no defendant other than Barr has been served with process. (See Cullen Declaration, Exhibit A, ¶ 7.) Accordingly, Barr is the only defendant in this action and no joinder is necessary in this removal.

20. Plaintiff clearly has no intention of serving Dr. Harwer in this action, but rather has named her as a defendant for the fraudulent purpose of defeating Barr's right to have this case heard in federal court. In her complaint, plaintiff states that she "notified defendant, Olina Harwer, M.D., on or about October 25, 2001, by certified mail of the intent to file suit pursuant to California Code of Civil Procedure § 364." (Complaint, Exhibit B, ¶ 11.) According to the complaint, that notice of plaintiff's intent to sue Dr. Harwer was mailed over two years ago, yet plaintiff has not served Dr. Harwer in this action. Further, plaintiff mailed that notice of her intent to file suit against Dr. Harwer before the date on which Parineeta Samanta allegedly suffered a pulmonary embolism, the event giving rise to this action, and before plaintiff alleges Dr. Harwer prescribed the oral contraceptive allegedly at issue. Plaintiff's naming of Dr. Harwer constitutes fraudulent joinder and, as such, cannot prevent removal.

21. Plaintiff's complaint does not specify the amount of damages sought, but prays for judgment against the defendants for general damages in the form of loss of society and comfort; medical and related expenses and special damages, including but not limited to funeral and burial expenses; prejudgment interest; court costs; and for such other relief the Court deems appropriate. (*See generally,* Complaint, Exhibit B.)

22. Although plaintiff's complaint makes an unspecified demand for damages, it is clear that the amount in controversy exceeds $75,000.00, exclusive of interest and costs. *See, e.g., Sanchez v. Monumental Life Insurance Co.*, 102 F.3d 398, 404 (9th Cir. 1996) (stating "in cases where a plaintiff's state court complaint does not specify a particular amount of damages, the removing defendant bears the burden of establishing, by a preponderance of the evidence, that the amount in controversy exceeds [$75,000]."); *Singer v. State Farm Mutual Automobile Insurance Co.*, 116 F.3d 373, 376 (9th Cir. 1997); *Bosinger v. Phillips Plastics Corp.*, 57 F.Supp.2d 986 (S.D. Cal.1999).

23. Under the "preponderance of the evidence" standard, the defendant must provide evidence establishing that it is "'more likely than not'" that the amount in controversy exceeds the jurisdictional amount. *See Sanchez v. Monumental Life Insurance Co.*, 102 F.3d 398, 404. That standard strikes "[t]he proper balance between a plaintiff's right to choose his forum and a defendant's right to remove without unnecessarily expanding federal diversity jurisdiction." *Id.*

24. Even where a defendant does not meet its burden to prove that it is more likely than not that the amount in controversy exceeds the jurisdictional amount, a district court may "make an independent appraisal of the amount of the claim, or suggest that the defendant is free to do so." *Bosinger v. Phillips Plastic Corp.*, 57 F. Supp. 2d 986, 988.

25. Plaintiff seeks damages for the death of her daughter, allegedly as a result of decedent's suffering a pulmonary embolism due to her use of an oral contraceptive manufactured by Barr Laboratories, Inc., and her successor's loss of society and comfort. Were plaintiff to prove liability and causation, plaintiff's damages likely would exceed $75,000 exclusive of interest and costs.

26. Counsel for Barr attempted to telephone plaintiff on February 24, 2004, to discuss the case and the issue of

damages. However, the telephone number provided by plaintiff on the complaint and summons is no longer valid. (Cullen Declaration, Exhibit A, ¶ 8.)

27. On February 26, 2004, Barr's counsel sent plaintiff a letter requesting that she contact Barr to discuss the case. Plaintiff has not done so. (*See* Cullen Declaration, ¶ 9, and Exhibit 1 thereto.) Nevertheless, given the seriousness of plaintiff's alleged damages, it is unlikely that plaintiff will dispute that the amount in controversy exceeds $75,000.

28. All prerequisites for removal have been satisfied. Barr filed this Notice of Removal within 30 days of having first ascertained that this case is removable. Complete diversity exists as to the properly joined and served parties; and, as set forth above, the amount in controversy exceeds Seventy-Five Thousand Dollars ($75,000.00), exclusive of interest and costs.

29. If any question arises as to the propriety of the removal of this action, Barr requests the opportunity to present a supplemental brief, limited discovery, and/or oral arguments in support of its position that this case is properly removed.

WHEREFORE, defendant Barr Laboratories, Inc., hereby removes the above-entitled action, now pending in the Superior Court of the State of California for the County of Orange, to this Court pursuant to 28 U.S.C. § 1441(b), and prays that the Clerk of the Superior Court of the State of California for the County of Orange accept no further pleadings in this cause initiated by plaintiff.

DATED: March 4, 2004 DRINKER BIDDLE & REATH LLP

By: /s/ Siolhan A. Cullen
DONALD F. ZIMMER, JR.
SIOBHAN A. CULLEN
Attorneys for Defendant
BARR LABORATORIES, INC.

EXHIBIT A

DECLARATION OF SIOBHAN A. CULLEN

I, SIOBHAN A. CULLEN declare as follows:

1. I am an attorney at the law firm of Drinker Biddle & Reath LLP, counsel of record for defendant Barr Laboratories, Inc. in this action. I am a member in good standing of the State Bar of California. I have personal knowledge of the facts set forth in this Declaration and, if called as a witness, could and would testify competently to such facts under oath.

2. To the best of its information and belief, Barr first received a copy of the complaint and summons at its offices in Pomona, New York on January 12, 2004.

3. On February 24, 2004, I checked the docket in the state court action and learned that the in pro per plaintiff had not served Dr. Harwer, despite the requirements of Rule 201.7(b) of the California Rules of Court.

4. To the best of my information and belief, as of this date plaintiff still has not served or filed a proof of service on Dr. Harwer, the only resident of California named as a defendant in plaintiffs complaint.

5. Plaintiff did not file an application for a court order extending the time to serve a pleading, as provided by the California Rules of Court, Rule 201.7(e), nor is there any other evidence in the docket or elsewhere that plaintiff intends to serve Dr. Harwer.

6. When checking the docket of the state court action on or about February 24, 2004, I also learned for the first time that Dr. Harwer has never answered plaintiffs complaint.

7. To the best of my information and belief, no defendant other than Barr has been served with process in this action.

8. With Karen L. Imbus of Ulmer & Berne LLP, of counsel in this action, I attempted to telephone plaintiff on February 24, 2004, to discuss the case and the issue of damages. However, the telephone number provided by plaintiff on the complaint and summons is no longer valid.

9. On February 26, 2004, Ms. Imbus sent plaintiff a letter requesting that she contact her to discuss the case. Exhibit I attached to this Declaration is a true and correct copy of the letter Ms. Imbus sent to plaintiff on February 25, 2004.

10. Plaintiff has not contacted Barr's counsel with a telephone number at which she can be reached. Therefore, we have been unable to discuss the case and the issue of damages with plaintiff. Nevertheless, given the seriousness of plaintiff's alleged damages, it is unlikely that she will dispute the fact that the amount in controversy exceeds $75,000.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 4, 2004, at Los Angeles, California.

/s/ Siobhan A. Cullen
SIOBHAN A. CULLEN

EXHIBIT 1

ulmer | berne | llp
ATTORNEYS

KAREN L. IMBUS

direct 513.698.5046
direct fax 513.698.5065
kimbus@ulmer.com

February 26, 2004

Ms. Meera Samanta
24916 Sea Crest Drive
Dana Point, CA 92629

Re: *Meera Samanta v. Olina Harwer, M.D., Barr Laboratories, Inc., and Does 1-100* Case No. 03CC13673

Dear Ms. Samanta:

Joseph P. Thomas and I represent Barr Laboratories, Inc., a defendant in the above-captioned lawsuit. In addition, Siobhan Cullen and Donald Zimmer of Drinker, Biddle and Reath LLP are serving as local counsel for our client in this case. I am contacting you directly because I understand that you are representing yourself in this matter. If you retain a lawyer, please let us know, and we will communicate directly with your attorney.

Rule 212 of the California Rules of Court requires that we confer before the case management conference. A copy of Rule 212 is enclosed. As the first case management conference is scheduled for March 23, Siobhan Cullen and I attempted to contact you yesterday at (949) 248-3177, the telephone number listed on the Summons and Complaint. However, we were informed by the telephone company that (949) 248-3177 is no longer a valid telephone number. We would appreciate, therefore, if you would provide us with a new telephone number at which you can be reached.

In addition, so that we can proceed with our factual investigation of this case, we ask that you execute the following enclosed authorization forms:

1. An authorization form for the release of Parineeta Samanta's medical, pharmacy, and insurance information to be released from Olina Ellen Harwer, M.D.
2. An authorization form for the release of Parineeta Samanta'a medical, pharmacy, and insurance information, with the name of the provider from whom the information is to be released, left blank. We will fill in the name of the medical, pharmacy, and insurance providers whose identities we learn during the course of discovery.
3. An authorization to release educational information for Parineeta Samanta.
4. An authorization to release employment information for Parineeta Samanta.

Please also provide Parineeta Samanta's social security number on the forms. When you have completed and signed the authorization forms, please return them to my attention at the offices of Ulmer & Berne LLP, 600 Vine Street, Suite 2800, Cincinnati, Ohio 45202-2409.

Thank you for your attention to these matters. We hope to speak with you in the near future, and most certainly before the case management conference.

Very truly yours,

/s/ Karen L. Imbus
KAREN L. IMBUS
Attorney for Defendant Barr Laboratories, Inc.

KLI/jgv
Enclosures

cc: Siobhan Cullen, Esq. (via e-mail)

BEST AVAILABLE COPY

EXHIBIT B

SUMMONS
(CITACION JUDICIAL)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

NOTICE TO DEFENDANT: *(Aviso a Acusado)*
OLINA HARWER, M.D., BARR LABORATORIES, INC., and DOES 1 through 100, Inclusive,

YOU ARE BEING SUED BY PLAINTIFF:
(A Ud. le está demandando)
MERRA SAMANTA, individually, and as successors in interest to the estate of PARINDETA SAMANTA

You have 30 CALENDAR DAYS after this summons is served on you to file a typewritten response at this court.

A letter or phone call will not protect you; your typewritten response must be in proper legal form if you want the court to hear your case.

If you do not file your response on time, you may lose the case, and your wages, money and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

Después de que le entreguen esta citación judicial usted tiene un plazo de 30 DIAS CALENDARIOS para presentar una respuesta escrita a máquina en esta corte.

Una carta o una llamada telefónica no le ofrecerá protección; su respuesta escrita a máquina tiene que cumplir con las formalidades legales apropiadas si usted quiere que la corte escuche su caso.

Si usted no presenta su respuesta a tiempo, puede perder el caso, y le pueden quitar su salario, su dinero y otras cosas de su propiedad sin aviso adicional por parte de la corte.

Existen otros requisitos legales. Puede que usted quiera llamar a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de referencia de abogados o a una oficina de ayuda legal (vea el directorio telefónico).

The name and address of the court is: *(El nombre y dirección de la corte es)*
SUPERIOR COURT OF THE STATE OF CALIFORNIA
700 Civic Center Drive West
P.O. Box 1994
Santa Ana, California 92702
CENTRAL JUSTICE CENTER

CASE NUMBER (Número del Caso)
03CC13673
JUDGE DEREK G. JOHNSON
DEPT. C7

The name, address, and telephone number of ~~PLAINTIFF~~ attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es)
Meera Samanta (949) 248 3177
24916 Sea Crest Drive
Dana Point, CA 92629

DATE: *(Fecha)* NOV 13 2003 ALAN SLATER Clerk, by *(Actuario)* ANGELA KNOX, Deputy *(Delegado)*

SUPERIOR COURT OF CALIFORNIA COUNTY OF ORANGE

NOTICE TO THE PERSON SERVED: You are served
1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of *(specify)*:
3. ☐ on behalf of *(specify)*:
under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (individual)
☐ other:
4. ☐ by personal delivery on *(date)*:

Form Adopted by Rule 982
Judicial Council of California
SUM-100 (Rev. January 1, 1991)

(See reverse for Proof of Service)
SUMMONS

Legal Solutions Plus

CCP 412.20

PROOF OF SERVICE - SUMMONS

(Use separate proof of service for each person served)

I served the

a. ☐ summons ☐ complaint ☐ amended summons ☐ amended complaint
☐ completed and blank Case Questionnaires ☐ Other *(specify)*:

b. on defendant *(name)*:

c. by serving ☐ defendant ☐ other *(name and title or relationship to person served)*:

d. ☐ by delivery ☐ at home ☐ at business
(1) date:
(2) time:
(3) address:

e. ☐ by mailing
(1) date:
(2) place:

2. Manner of service *(check proper box)*:

a. ☐ **Personal service.** By personally delivering copies. (CCP 415.10)

b. ☐ **Substituted service on corporation, unincorporated association (including partnership), or public entity.** By leaving, during usual office hours copies in the office of the person served with the person who apparently was in charge and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(a))

c. ☐ **Substituted service on natural person, minor, conservatee, or candidate.** By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of the office or place of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(b)) *(Attach separate declaration or affidavit stating acts relied on to establish reasonable diligence in first attempting personal service.)*

d. ☐ **Mail and acknowledgment service.** By mailing (by first-class mail or airmail, postage prepaid) copies to the person served, together with two copies of the form of notice and acknowledgment and a return envelope, postage prepaid, addressed to the sender. (CCP 415.30) *(Attach completed acknowledgment of receipt.)*

e. ☐ **Certified or registered mail service.** By mailing to an address outside California (by first-class mail, postage prepaid, requiring a return receipt) copies to the person served. (CCP 415.40) *(Attach signed return receipt or other evidence of actual delivery to the person served.)*

f. ☐ Other *(specify code section)*:
☐ additional page is attached.

3. The "Notice to the Person Served" (on the summons) was completed as follows (CCP 412.30, 415.10, and 474):

a. ☐ as an individual defendant.

b. ☐ as the person sued under the fictitious name of *(specify)*:

c. ☐ on behalf of *(specify)*:
under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor) ☐ other:
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (individual)

d. ☐ by personal delivery on *(date)*:

4. At the time of service I was at least 18 years of age and not a party to this action.

5. Fee for service: $

6. Person serving:

a. ☐ California sheriff, marshal, or constable.

b. ☐ Registered California process server.

c. ☐ Employee or independent contractor of a registered California process server.

d. ☐ Not a registered California process server.

e. ☐ Exempt from registration under Bus. & Prof. Code 22350(b).

f. Name, address and telephone number and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

(For California sheriff, marshal, or constable use only)
I certify that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

ATTORNEY OR PARTY WITHOUT ATTORNEY:
Meera Samanta
Meera Samanta
24916 Sea Crest Drive
Dana Point, CA 92629

TELEPHONE NO.: (949) 248 3177 FAX NO.:
ATTORNEY FOR (Name): IN PRO PER

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
STREET ADDRESS: 700 Civic Center Drive West
MAILING ADDRESS: P.O. Box 1994
CITY AND ZIP CODE: Santa Ana, California 92702
BRANCH NAME: CENTRAL JUSTICE CENTER

CASE NAME: MEERA SAMANTA, V. OLINA HARWER, M.D., et al.

CIVIL CASE COVER SHEET	Complex Case Designation	CASE NUMBER:
[X] Unlimited (Amount demanded exceeds $25,000) [ ] Limited (Amount demanded is $25,000 or less)	[ ] Counter [ ] Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 1811)	JUDGE: DEPT:

All five (5) items below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort
- [ ] Auto (22)
- [ ] Uninsured motorist (46)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort
- [ ] Asbestos (04)
- [ ] Product liability (24)
- [ ] Medical malpractice (45)
- [X] Other PI/PD/WD (23)

Non-PI/PD/WD (Other) Tort
- [ ] Business tort/unfair business practice (07)
- [ ] Civil rights (08)
- [ ] Defamation (13)
- [ ] Fraud (16)
- [ ] Intellectual property (19)
- [ ] Professional negligence (25)
- [ ] Other non-PI/PD/WD tort (35)

Employment
- [ ] Wrongful termination (36)
- [ ] Other employment (15)

Contract
- [ ] Breach of contract/warranty (06)
- [ ] Collections (09)
- [ ] Insurance coverage (18)
- [ ] Other contract (37)

Real Property
- [ ] Eminent domain/inverse condemnation (14)
- [ ] Wrongful eviction (33)
- [ ] Other real property (26)

Unlawful Detainer
- [ ] Commercial (31)
- [ ] Residential (32)
- [ ] Drugs (38)

Judicial Review
- [ ] Asset forfeiture (05)
- [ ] Petition re: arbitration award (11)
- [ ] Writ of mandate (02)
- [ ] Other judicial review (39)

Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 1800–1812)
- [ ] Antitrust/Trade regulation (03)
- [ ] Construction defect (10)
- [ ] Mass tort (40)
- [ ] Securities litigation (28)
- [ ] Environmental/Toxic tort (30)
- [ ] Insurance coverage claims arising from the above listed provisionally complex case types (41)

Enforcement of Judgment
- [ ] Enforcement of judgment (20)

Miscellaneous Civil Complaint
- [ ] RICO (27)
- [ ] Other complaint (not specified above) (42)

Miscellaneous Civil Petition
- [ ] Partnership and corporate governance (21)
- [ ] Other petition (not specified above) (43)

2. This case [ ] is [X] is not complex under rule 1800 of the California Rules of Court. If case is complex, mark the factors requiring exceptional judicial management:
   a. [ ] Large number of separately represented parties
   b. [ ] Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
   c. [ ] Substantial amount of documentary evidence
   d. [ ] Large number of witnesses
   e. [ ] Coordination with related actions pending in one or more courts in other counties, states or countries, or in a federal court
   f. [ ] Substantial post-judgment judicial supervision
3. Type of remedies sought (check all that apply):
   a. [X] monetary b. [ ] nonmonetary; declaratory or injunctive relief c. [ ] punitive
4. Number of causes of action (specify):
5. This case [ ] is [X] is not a class action suit.

Date:

Meera Samanta
(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE
- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate, Family, or Welfare and Institutions Code). (Cal. Rules of Court, rule 201.8.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 1800 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a complex case, this cover sheet shall be used for statistical purposes only.

Form Adopted for Mandatory Use
Judicial Council of California
CIVIL CASE COVER SHEET
Legal Solutions Plus
Cal. Rules of Court, rules 201.8, 1800–1812
Standards of Judicial Administration, § 19

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

To Plaintiffs and Others Filing First Papers

If you are filing a first paper (for example, a complaint) in a civil case, you must complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must check all five items on the sheet. In item 1, you must check one box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the primary cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. You do not need to submit a cover sheet with amended papers. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 201.8(c) and 227 of the California Rules of Court.

To Parties in Complex Cases

In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 1800 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

Auto Tort
- Auto (22)—Personal Injury/Property Damage/Wrongful Death
- Uninsured Motorist (46) *(if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto)*

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort
- Asbestos (04)
  - Asbestos Property Damage
  - Asbestos Personal Injury/Wrongful Death
- Product Liability *(not asbestos or toxic/environmental)* (24)
- Medical Malpractice (45)
  - Medical Malpractice—Physicians & Surgeons
  - Other Professional Health Care Malpractice
- Other PI/PD/WD (23)
  - Premises Liability (e.g., slip and fall)
  - Intentional Bodily Injury/PD/WD (e.g., assault, vandalism)
  - Intentional Infliction of Emotional Distress
  - Negligent Infliction of Emotional Distress
  - Other PI/PD/WD

Non-PI/PD/WD (Other) Tort
- Business Tort/Unfair Business Practice (07)
- Civil Rights (e.g., discrimination, false arrest) *(not civil harassment)* (08)
- Defamation (e.g., slander, libel) (13)
- Fraud (16)
- Intellectual Property (19)
- Professional Negligence (25)
  - Legal Malpractice
  - Other Professional Malpractice *(not medical or legal)*
- Other Non-PI/PD/WD Tort (35)

Employment
- Wrongful Termination (36)
- Other Employment (15)

Contract
- Breach of Contract/Warranty (06)
  - Breach of Rental/Lease Contract *(not unlawful detainer or wrongful eviction)*
  - Contract/Warranty Breach—Seller Plaintiff *(not fraud or negligence)*
  - Negligent Breach of Contract/Warranty
  - Other Breach of Contract/Warranty
- Collections (e.g., money owed, open book accounts) (09)
  - Collection Case—Seller Plaintiff
  - Other Promissory Note/Collections Case
- Insurance Coverage *(not provisionally complex)* (18)
  - Auto Subrogation
  - Other Coverage
- Other Contract (37)
  - Contractual Fraud
  - Other Contract Dispute

Real Property
- Eminent Domain/Inverse Condemnation (14)
- Wrongful Eviction (33)
- Other Real Property (e.g., quiet title) (26)
  - Writ of Possession of Real Property
  - Mortgage Foreclosure
  - Quiet Title
  - Other Real Property *(not eminent domain, landlord/tenant, or foreclosure)*

Unlawful Detainer
- Commercial (31)
- Residential (32)
- Drugs (38) *(if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential.)*

Judicial Review
- Asset Forfeiture (05)
- Petition Re: Arbitration Award (11)
- Writ of Mandate (02)
  - Writ—Administrative Mandamus
  - Writ—Mandamus on Limited Court Case Matter
  - Writ—Other Limited Court Case Review
- Other Judicial Review (39)
  - Review of Health Officer Order
  - Notice of Appeal—Labor Commissioner Appeals

Provisionally Complex Civil Litigation (Cal. Rules of Court Rule 1800-1812)
- Antitrust/Trade Regulation (03)
- Construction Defect (10)
- Claims Involving Mass Tort (40)
- Securities Litigation (28)
- Toxic Tort/Environmental (30)
- Insurance Coverage Claims *(arising from provisionally complex case type listed above)* (41)

Enforcement of Judgment
- Enforcement of Judgment (20)
  - Abstract of Judgment (Out of County)
  - Confession of Judgment *(non-domestic relations)*
  - Sister State Judgment
  - Administrative Agency Award *(not unpaid taxes)*
  - Petition/Certification of Entry of Judgment on Unpaid Tax
  - Other Enforcement of Judgment Case

Miscellaneous Civil Complaint
- RICO (27)
- Other Complaint *(not specified above)* (42)
  - Declaratory Relief Only
  - Injunctive Relief Only *(non-harassment)*
  - Mechanics Lien
  - Other Commercial Complaint Case *(non-tort/non-complex)*
  - Other Civil Complaint (non-tort/non-complex)

Miscellaneous Civil Petition
- Partnership and Corporate Governance (21)
- Other Petition *(not specified above)* (43)
  - Civil Harassment
  - Workplace Violence
  - Elder/Dependent Adult Abuse
  - Election Contest
  - Petition for Name Change
  - Petition for Relief from Late Claim
  - Other Civil Petition

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE—CENTRAL JUSTICE CENTER

[Filed NOV 13, 2003]

CASE NO. 03CC13673

MEERA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA

Plaintiff,

vs.

OLINA HARWER, M.D., BARR LABORATORIES, INC., and DOES 1 through 100 Inclusive,

Defendants.

COMPLAINT FOR COMPENSATORY DAMAGES:

WRONGFUL DEATH AND SURVIVAL ACTION

1. STRICT PRODUCTS LIABILITY
2. FAILURE TO WARN
3. NEGLIGENCE
4. MEDICAL NEGLIGENCE
5. LACK OF INFORMED CONSENT

COMES NOW Plaintiff MEERA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA, in complaint of Defendants, OLINA HARWER, M.D., BARR LABORATORIES, INC., and DOES 1 through, 100, inclusive, as follows:

GENERAL ALLEGATIONS

1. The wrongful death upon which this action is based occurred at Ravi Kiran, 10th Rd, JVPD Scheme, Juhu, Mum-

bai 400 049, India. However, Plaintiff, MEERA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA resides in the County of Orange, State of California; defendant OLINA HARWER, M.D. is licensed to practice medicine in the State of California and provided medical treatment to decedent PARINEETA SAMANTA, at her office in the County of Orange, State of California; and defendant BARR LABORATORIES, INC. has a substantial connection with the County of Orange, State of California through its pharmaceutical sales and has therefore purposefully availed itself of the County of Orange, State of California.

2. Plaintiff, MEERA SAMANTA, was the mother of decedent PARINEETA SAMANTA and is the decedent's successor in interest. Accordingly, Plaintiff MEERA SAMANTA is filing her declaration pursuant to Code of Civil Procedure § 377.32 concurrently herewith.

3 At all times mentioned herein decedent PARINEETA SAMANTA had cerebral palsy and had the mental capacity of about a 7 year old child. Decedent's date of birth is February 5, 1968 and decedent died on November 14, 2002 from a pulmonary embolism proximately and legally caused by the drug Kariva, an oral contraceptive, even though decedent was taking the drug as prescribed.

4. At all relevant times mentioned herein plaintiff, MEERA SAMANTA, was the decedent's legal guardian and made all decisions including but not limited to medical decisions for PARINETTA SAMANTA because of decedent's reduced and impaired mental incapacity.

5. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants DOE 1 through DOE 100 are unknown to plaintiff, who therefore sues said defendants by such fictitious names and will ask leave of the court to amend this complaint to show their true names and capacities when the same are ascertained.

6. Plaintiff is informed and believes, and thereupon alleges, that each Defendant fictitiously named herein as a DOE is legally responsible in some manner for the professional malpractice, negligence, or in some other actionable manner, for the events and happenings hereinafter referred to as well as were tortiously responsible in some manner for legally causing the injuries and damages to Plaintiff as hereinafter alleged, including, but not limited to, tortious liability based upon general negligence, professional negligence, products liability, premises liability, volunteer liability, governmental liability and any other statutory and common law tort liability laws giving rise to third party standing on the part of plaintiff. Plaintiff will seek leave of court to amend this complaint to insert the true names and/or capacities of such fictitiously named Defendants when the same have been ascertained.

7. Plaintiff is informed and believes and on such information and belief allege that defendants, BARR LABORATORIES, INC., and DOES 1 through 50, inclusive, are engaged in the business of manufacturing, compounding, packaging, designing, distributing, testing, constructing, fabricating, analyzing, recommended merchandising, warning, promoting and selling, supplying, marketing, and consulting in the use of, and otherwise placing in the stream of commerce, the prescription drug Kariva, an oral contraceptive—the generic form of the oral contraceptive Mircette.

8. Defendants, OLINA HARWER, M.D., and DOES 51 through 100, inclusive, were physicians, surgeons, or other hospital, medical or allied personnel holding themselves out to be duly licensed to practice medicine, surgery, and related medical services in the County of Orange, State of California, and to possess that degree of skill, ability and expertise, knowledge, qualifications, and learning of similar practitioners in said community.

9. Plaintiff is informed and believes and upon such information and belief alleges that at all times herein mentioned, defendants and DOES, and each of them, were the agents, employees, partners, joint venturers, assistants and/or consultants of the co-defendants and were, as such, acting within the course, scope, purpose and authority of said agency and employment; further, that each and every defendant as aforesaid, when acting as a principal, was negligent in the selection, hiring, and supervision of each and every other defendant agent servant, employee, assistant and/or consultant.

10. Defendants, OLINA HARWER, M.D., BARR LABORATORIES, INC., and DOES 1 through 100, inclusive, each acted in conjunction and accord, and conspired with each other as agents, ostensible agents, employees, servants or representatives of each other in their treatment and representations or the lack of appropriate treatment and representations to decedent, PARINEETA SAMANTA and decedent's mother MEERA SAMANTA.

11. Plaintiff notified Defendant, OLINA HARWER, M.D., on or about October 25, 2001, by certified mail of the intent to file suit pursuant to California *Code of Civil Procedure* § 364.

FIRST CAUSE OF ACTION

STRICT PRODUCTS LIABILITY

(Against BARR LABORATORIES, INC. and DOES 1 through 50, Inclusive)

12. Plaintiff, MEERA SAMANTA, individually, and as successor in interest to the estate of PARINEETA SAMANTA, realleges and incorporates paragraphs 1 through 11, above, as though fully set forth here.

13. At all times relevant herein, Defendants BARR LABORATORIES, INC, and DOES 1 through 50, inclusive, and each of them, were at all times relevant herein, engaged

in the business of manufacturing, compounding, packaging, designing, distributing, testing, constructing, fabricating, analyzing, recommended merchandising, advertising, promoting and selling, supplying, marketing, and consulting in the use of, and otherwise placing in the stream of commerce, the prescription drug Kariva, an oral contraceptive.

14. On or about August 19, 2002, and at times thereafter, decedent, PARINETTA SAMANTA, ingested Kariva as directed and prescribed by a physician defendant, OLINA HARWER, M.D.

15. At all times relevant herein, Kariva was unreasonably unsafe for its intended use and was defective by reason of design, distribution, manufacturing, promotion, testing, and/or lack of adequate warnings.

16. At all times relevant herein, Defendants, BARR LABORATORIES, INC., and DOES 1 through 50, inclusive, and each of them knew or should have known about these defects of Kariva, and failed to warn decedent, PARINETTA SAMANTA, her mother MEERA SAMANTA, her doctors and the general public about those defects at the time they were manufacturing, compounding, packaging, designing, distributing, testing, constructing, fabricating, analyzing, recommending, merchandising, advertising, promoting, selling, supplying, marketing and consulting in the use of, and otherwise placing in the stream of commerce, the prescription drug Kariva.

17. Although decedent's use of Kariva was as directed by a physician and for its intended and foreseeable purposes, said use proximately and legally caused decedent, PARINETTA SAMANTA to suffer and developed a blood clot and resulted in a pulmonary embolism and death.

18. Plaintiff, MEERA SAMANTA, is informed and believes and upon such information and belief alleges that Defendants, BARR LABORATORIES, INC. and DOES 1

through 50, inclusive, and each of them, were aware that Kariva was highly toxic and posed an unreasonable danger of blood clot and pulmonary embolism, muscle weakness and/or damage, and conditions related thereto, to members of the public who took and used Kariva as recommended and prescribed by physicians. Defendants, BARR LABORATORIES, INC., and DOES I through 50, inclusive, and each of them, were aware that Kariva was unreasonably dangerous if taken as prescribed based upon reported cases of such complications over the last several years.

19. As a proximate and legal result of the tortious acts and omissions of the Defendants, and the death of the decedent, PARINETTA SAMANTA, Plaintiff, MEERA SAMANTA has been deprived of the love, affection, society, comfort, support, contributions, and inheritance of the decedent, and the Plaintiff has suffered said damages in an amount currently unknown, but which will be proven at the time of trial and are well in excess of the jurisdiction of this court.

20. As a further proximate and legal result of the tortious acts and omissions of the Defendants, Plaintiff incurred funeral and burial expenses in an amount currently unknown, but which will be proven at the time of trial.

21. As a further proximate and legal result of the tortious acts and/or omissions of the Defendants, Plaintiff was obligated to pay medical expenses which are also currently unknown, but which will also be proven at the time of trial.

SECOND CAUSE OF ACTION

FAILURE TO WARN

(AGAINST BARR LABORATORIES and DOES 1 through 50, Inclusive)

22. Plaintiff incorporates by reference all preceeding paragraphs of this complaint as fully set forth herein.

23. The Kariva manufactured and supplied by Defendants, BARR LABORATORIES and DOES 1 through 50, Inclusive, was not accompanied by proper or adequate warnings to physicians, and consumers regarding all possible adverse side effects associated with the use of Baycol and the severity and duration of its adverse side effects.

24. The warnings and information provided by the Defendants, BARR LABORATORIES and DOES 1 through 50, Inclusive did not accurately reflect the symptoms, scope and severity of the potential side effects of Kariva.

25. Defendants, BARR LABORATORIES and DOES 1 through 50, Inclusive, failed to perform adequate testing and such testing would have shown Defendants that Kariva possessed serious potential adverse health effects about which full and proper warnings accurately describing said dangers should have been made.

26. Defendants' BARR LABORATORIES and DOES 1 through 50, Inclusive, manufacture and sale of Kariva was defective in that it had inadequate warnings or instructions because, after defendants knew or should have known of the serious risks of Kariva's use, defendants failed to provide full and complete warnings adequately identifying said dangers to the consumers of Kariva; instead, Defendants continued to aggressively market and promote Kariva use as safe and effective.

27. Had Defendants provided adequate warnings, plaintiff would not have suffered the damages alleged, and the damages suffered.

28. As a proximate and legal result of the tortious acts and omissions of the Defendants, and the death of the decedent, PARINETTA SAMANTA, Plaintiff, MEERA SAMANTA, has been deprived of the love, affection, society, comfort, support, contributions, and inheritance of the decedent, and the Plaintiff has suffered said damages in an amount currently

unknown, but which will be proven at the time of trial and are well in excess of the jurisdiction of this court.

29. As a further proximate and legal result of the tortious acts and omissions of the Defendants, Plaintiff incurred funeral and burial expenses in an amount currently unknown, but which will be proven at the time of trial.

30. As a further proximate and legal result of the tortious acts and/or omissions of the Defendants. Plaintiff was obligated to pay medical expenses which are also currently unknown, but which will also be proven at the time of trial.

THIRD CAUSE OF ACTION

NEGLIGENCE

(AGAINST BARR LABORATORIES and DOES 1 through 50, Inclusive)

31. Plaintiff incorporates by reference all preceding paragraphs of this complaint as fully set forth herein.

32. Defendants, BARR LABORATORIES and DOES 1 through 50, Inclusive, owed a duty to exercise reasonable care to decedent in the design, manufacturer, sale, and/or distribution of Kariva before placing the drug into the stream of commerce including a duty to assure that the product did not cause users to suffer from unreasonably dangerous side effects even though used for its intended purpose of administration and ingestion by consumers as an oral contraceptive.

33. Defendants, BARR LABORATORIES and DOES 1 through 50, Inclusive failed to exercise ordinary care and breached their duty to decedent by failing to properly manufacture, inspect, prepare, research, investigate, test, evaluate, analyze, and provide and distribute the Kariva that was purchased and ingested by the decedent.

34. Plaintiff, on information and belief, alleges that Defendants, BARR LABORATORIES and DOES 1 through 50, Inclusive were negligent in the design, manufacture, testing and advertising, warning, marketing and sale of Kariva in that: Defendants failed to used due care in the aforementioned steps to avoid the aforementioned risks to individuals when Kariva was prescribed, and failed to accompany their products with proper warnings regarding all possible adverse effects associated with the use of Kariva and the comparative severity and duration of such adverse effects, further the warnings provided with the product failed to properly warn about all possible adverse effects associated with the use of Kariva, together with other pharmaceutical drugs; Defendants also failed to conduct adequate pre-clinical and clinical testing and post-marketing surveillance and follow-up concerning the drug; and failed to warn health care providers and the decedent about the need for follow-up care and medical monitoring when on the drug Kariva, and failed to timely apprize and inform the FDA of the new information concerning adverse effects of the drug; and negligently delayed warning about the drug when they knew, or in the exercise of reasonable care should have known that the drug was unreasonably dangerous to the users; and were otherwise careless and negligent.

35. As a proximate and legal result of the aforementioned negligence of the Defendants, decedent, PARINETTA SAMANTA, suffered death and Plaintiff MEERA SAMANTA has been deprived of the love, affection, society, comfort, support, contributions, and inheritance of the decedent, and the Plaintiff has suffered said damages in an amount currently unknown, but which will be proven at the time of trial and are well in excess of the jurisdiction of this court.

36. As a further proximate and legal result of the tortious acts and omissions of the Defendants, Plaintiff incurred funeral and burial expenses in an amount currently unknown, but which will be proven at the time of trial.

37. As a further proximate and legal result of the tortious acts and/or omissions of the Defendants, Plaintiff was obligated to pay medical expenses which are also currently unknown, but which will also be proven at the time of trial.

FOURTH CAUSE OF ACTION

MEDICAL NEGLIGENCE

(Against OLINA, HARWER, M.D., and DOES 51 through 100, Inclusive)

38. Plaintiff incorporates by reference all preceding paragraphs of this complaint as fully set forth herin.

39. On or about July 22, 2002 and thereafter, plaintiff MEERA SAMANTA, on behalf of decedent, PARINEETA SAMANTA, consulted and engaged for compensation the medical services of the defendants, OLINA HARWER, M.D. and DOES 51 through 100, Inclusive, and each of them, so as to secure and receive appropriate medical treatment as was reasonable and necessary relative to the plaintiff's then existing medical condition, health and well-being, including, but not limited to, performing evaluation, diagnosis and treatment of decedent PARINEETA SAMANTA'S irregular and heavy menstrual periods and a fibroid uterus.

40. Through the rendering of medical care, a physician/patient and/or hospital/patient relationship was formed between decedent, PARINEETA SAMANTA, and said Defendants, OLINA HARWER M.D. and DOES 51 through 100, Inclusive. Pursuant to the aforementioned relationship; Defendants, each of them, undertook said employment for compensation and agreed to render and provide such medical services and otherwise do all things necessary and proper for plaintiffs general health and well-being and to thereafter issue the course of care and treatment.

41. At all times mentioned herein, decedent, PARINEETA SAMANTA, as well as during the course and scope of any

surgical/medical procedures or treatment performed on her person, was under the exclusive control of the defendants at all times mentioned herein.

42. At all times mentioned herein, Defendants, OLINA HARWER, MD. and DOES 51 through 100, Inclusive, each of them, had a duty to comport with the standard of care applicable to healthcare providers under similar circumstances within the medical community.

43. At all times mentioned herein, defendants, OLINA HARWER, M.D. and DOES 51 through 100, Inclusive, negligently failed to possess and exercise that degree of knowledge and skill ordinarily possessed and exercised by the physicians, surgeons, hospital, nurses, attendants, technicians, consultants and the like engaged in said professions in the same or similar locality as defendants, each of them as aforesaid because defendants negligently prescribed an oral contraceptive, which defendant knew or should have known should not have been prescribed to a person with cerebral palsy such as decedent.

44. On or about August 19, 2002, and at times thereafter, Defendants, OLINA HARWER, M.D. and DOES 51 through 100, Inclusive, undertook duties and responsibilities including, but not limited to, properly performing the screening, evaluation, diagnosis, care and treatment for Plaintiff's aforementioned symptoms, as well as the care and treatment for her general health and welfare. Prior to August 19, 2002, Defendants, and each of them, knew or in the exercise of reasonable care should have known that Kariva was known to be dangerous and had been linked to blood clots and pulmonary embolism and death and that the drug was not appropriate for the decedent's use because decedent had cerebral palsy.

45. On or about August 19, 2002, and at times thereafter, Defendants OLINA HARWER, M.D., and DOES 51-100,

Inclusive, were negligent in performing the care and treatment for decedent's aforementioned symptoms, including, but not necessarily limited to, ordering decedent, to take the drug Kariva, which Defendants, OLINA HARWER, M.D., and DOES 51-100, Inclusive, knew or should have known presents unreasonable risk of side-effects and injuries, which include but are not limited to blood clot, pulmonary embolism and death.

46. Said negligence caused serious and needless injuries including, blood clot, pulmonary embolism and death.

47. As physicians, surgeons, or other hospital, medical or allied personnel assisting and/or attending Plaintiff, DOES 51 through 100, inclusive, breached their duty of care to decedent by failing to perform, supervise and/or ensure the proper evaluation, care, and treatment of decedent's condition and injuries, including, but not limited to, the aforementioned procedures, presentation, history and complaints.

48. The Defendants' breaches of duty, as aforementioned, were a substantial factor and legal cause decedent decedent's death because decedent was not a candidate for the oral contraceptive Kariva because decedent suffered from cerebral palsy.

49. As a proximate and legal result of the aforementioned negligence of the Defendants, decedent, PARINEETA SAMANTA, suffered death and Plaintiff, MEERA SAMANTA has been deprived of the love, affection, society, comfort, support, contributions, and inheritance of the decedent, and the Plaintiff has suffered said damages in an amount currently unknown, but which will be proven at the time of trial and an well in excess of the jurisdiction of this court.

50. As a further proximate and legal result of the tortious acts and omissions of the Defendants, Plaintiff incurred funeral and burial expenses in an amount currently unknown, but which will be proven at the time of trial.

51. As a further proximate and legal result of the tortious acts and/or omissions of the Defendants, Plaintiff was obligated to pay medical expenses which are also currently unknown, but which will also be proven at the time of trial.

FIFTH CAUSE OF ACTION

LACK OF INFORMED CONSENT – WRONGFUL DEATH

52. Plaintiff incorporates by reference all preceding paragraphs of this complaint as fully set forth herein.

53. At all times mentioned herein, Defendants, OLINA HARWER, M.D., and DOES 51 through 100, Inclusive, had a duty to disclose to decedent, PARINEETA SAMANTA through her mother and legal guardian MEERA SAMANTA, all known risks of death, serious bodily harm, and possible complications associated with oral contraceptive defendant prescribed. Such undisclosed risks include, but are not limited to the risk of blood clot, pulmonary embolism and death.

54. At all times mentioned herein, Defendants, OLINA HARWER, M.D., and DOES 51 through 100, Inclusive, had a duty to disclose to decedent, PARINEETA SAMANTA through her mother and legal guardian MEERA SAMANTA, any and all additional information that a skilled practitioner in good standing would disclose under the same or similar circumstances.

55. At all times relevant herein, defendant, OLINA HARWER, M.D., and DOES 51 through 100, Inclusive, breached their respective duties to disclose the aforementioned risks.

56. At all times relevant herein, defendants OLNA HARWER, M.D., and DOES 51 through 100, Inclusive, further breached their respective duties to disclose additional information that a skilled practitioner in good standing would provide under the same or similar circumstances. Such breaches include, but are not limited to: a) Defendants' failure to disclose that defendant was prescribing an oral contraceptive;

and b) Defendants' failure to inform decedent, PARINEETA SAMANTA through her mother and legal guardian MEERA SAMANTA, of the risks involved in prescribing said oral contraceptives to a person with cerebral palsy.

57. At all times relevant herein, the decedent PARINEETA SAMANTA through her mother and legal guardian MEERA SAMANTA would have refused the treatments ordered and performed by Defendants, had defendants not breached their respective duties to disclose the aforementioned information.

58. As a proximate and legal result of the conduct of the defendants, and each of them, Plaintiff, suffered the death of her daughter, PARINEETA SAMANTA, thereby suffering great physical and mental pain and suffering all to her general damages in amounts not yet known, but which will be proven at trial.

59. As a further proximate and legal result of the negligence of the defendants, and each of them, plaintiff have suffered medical and related expenses in an amount not yet known. The plaintiff will seek leave of the Court to amend this complaint when said amount is ascertained.

PRAYER

WHEREFORE, Plaintiff, MEERA SAMANTA, individually, and as successor in interest to the estate of PARINETTA SAMANTA, rightfully prays for judgment against Defendants as follows:

FIRST CAUSE OF ACTION

PRODUCTS LIABILITY

1. General damages in the form of loss of comfort and society;

2. Medical and related expenses and special damages incurred, including but not limited to funeral and burial expenses in such sums as may be proved at trial;
3. Prejudgment interest as indicated;
4. Cost of suit herein;
5. For such other and further relief as the court may deem proper.

SECOND CAUSE OF ACTION

FAILURE TO WARN

1. General damages in the form of loss of comfort and society;
2. Medical and related expenses and special damages incurred, including but not limited to funeral and burial expenses in such sums as may be proved at trial;
3. Prejudgment interest as indicated;
4. Cost of suit herein;
5. For such other and further relief as the court may deem proper.

THIRD CAUSE OF ACTION

NEGLIGENCE

1. General damages in the form of loss of comfort and society;
2. Medical and related expenses and special damages incurred, including but not limited to funeral and burial expenses in such sums as may be proved at trial;
3. Prejudgment interest as indicated;
4. Cost of suit herein;
5. For such other and further relief as the court may deem proper.

FOURTH CAUSE OF ACTION

MEDICAL NEGLIGENCE

1. General damages in the form of loss of comfort and society;
2. Medical and related expenses and special damages incurred, including but not limited to funeral and burial expenses in such sums as may be proved at trial;
3. Prejudgment interest as indicated;
4. Cost of suit herein;
5. For such other and further relief as the court may deem proper.

FIFTH CAUSE OF ACTION

LACK OF INFORMED CONSENT

1. General damages in the form of loss of comfort and society;
2. Medical and related expenses and special damages incurred, including but not limited to funeral and burial expenses in such sums as may be proved at trial;
3. Prejudgment interest as indicated;
4. Cost of suit herein;
5. For such other and further relief as the court may deem proper.

DATED:October_____2003

BY: _____

MEERA SAMANTA, individually, and as successor in interest to the estate of PARINEETA SAMANTA
In Pro Per

DECLARATION OF MEERA SAMANTA
PURSUANT TO C.C.P. §§ 377.30, 377.32

I, MEERA SAMANTA, DO DECLARE AS FOLLOWS:

1. PARINEETA SAMANTA was born on February 5, 1968 and died on November 14, 2002. Her place of death was Ravi Kiran; 10th Rd, JVPD Scheme, Juhu, Mumbai 400 049, India. A certified copy of her Death Certificate is attached hereto, incorporated by reference herein and filed concurrently herewith.

2. No proceedings are now pending in California or any other state for the administration of decedent's estate nor do I presently intend on personally initiating any such proceedings.

3. I, MEERA SAMANTA, am Decedent PARINEETA SAMANTA's successor in interest as defined in C.C.P § 377.11 of the California Code of Civil Procedure and succeed to the Decedent's interest in the action or proceedings herein.

4. I have become the decedent, PARINEETA SAMANTA's successor in interest by virtue of the fact that I am her mother. I am the lawful beneficiary of the decedent in the pending action or proceeding.

5. No other person has a superior right to commence the action proceedings herein or to be substituted for the decedent in the pending action or proceeding.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

DATED: _____

_____
MEERA SAMANTA
Successor in interest & Mother of
Decedent, PARINEETA SAMANTA

EXHIBIT C

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

CASE NO.: 03CC13673

MEERA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA,
Plaintiff,

vs.

OLINA HARWER, M.D., BARR LABORATORIES, INC., AND DOES 1 THROUGH 100, INCLUSIVE
Defendants.

Complaint Filed: November 13, 2003
Trial Date: None
Judge Derek G. Johnson

ANSWER OF BARR LABORATORIES, INC.

Defendant, Barr Laboratories, Inc. (herein "defendant") answers plaintiff's unverified complaint as follows:

Under the provisions of *Code of Civil Procedure* § 431.30(d), defendant denies each and every allegation of the complaint and the whole complaint, and further denies that plaintiff and/or her decedent were damaged in the sum alleged or any other sum whatsoever. Defendant further denies that plaintiff's and/or her decedent's alleged injuries resulted from or were in any way connected with any product, act, omission, fault, conduct, or liability on the part of defendant whether negligent, careless, unlawful, or of any nature, alleged or otherwise, and denies that defendant was in any

way negligent, careless, reckless, wanton, or unlawful, or that any product manufactured by defendant was defective or unreasonably dangerous.

FOR A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE

The complaint fails to state facts sufficient to constitute a cause of action against defendant.

FOR A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff's and/or her decedent's alleged injuries, damages and/or losses were proximately caused by the negligence and/or fault of plaintiff and/or her decedent and/or individuals or entities other than defendant, and this comparatively reduces the percentage of any negligence and/or fault attributable to defendant.

FOR A THIRD SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff has produced no evidence that plaintiff's decedent used a product manufactured by Barr Laboratories, Inc.

FOR A FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE

In the event it is established that plaintiff used Kariva, plaintiff and/or her decedent had full knowledge of, accepted, and assumed all risks and possible adverse effects related to the use of Kariva. Plaintiff's recovery, therefore, is barred, diminished, reduced, or offset under the principles of assumption of the risk and/or informed consent.

FOR A FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE

If the plaintiff and/or her decedent suffered or sustained any injury, loss, or damage as a result of the alleged incident referred to in plaintiff's complaint, the injury, loss, or damage

was a direct result of plaintiff's and/or her decedent's failure to follow the reasonable advice of decedent's healthcare providers.

FOR A SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff cannot recover from defendant because her injuries and damages and/or the injuries and damages of her decedent, if any, were caused by plaintiff and or her decedent's misuse, abuse, and/or alteration of Kariva or other products allegedly at issue in this litigation.

FOR A SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE

The warnings and admonitions disseminated to the relevant medical community about Kariva adequately reflected the risks that were known, or scientifically knowable, at the time that plaintiff's decedent allegedly ingested Kariva. Plaintiff's decedent's physicians acted as "learned intermediaries" in determining that Kariva's benefits outweighed the known risks and in relating the nature and extent of those risks to plaintiff and/or her decedent. Therefore, defendant is not liable to plaintiff.

FOR AN EIGHTH, SEPARATE AND AFFIRMATIVE DEFENSE

Defendant or its agents, representatives, and employees gave adequate warnings, instructions, notices, and directions to all individuals involved regarding the care, operation, use, and maintenance of the product allegedly at issue, including all proper safety measures, precautions, and procedures.

FOR A NINTH, SEPARATE AND AFFIRMATIVE DEFENSE

If the plaintiff and/or her decedent suffered or sustained any injury, loss, or damage as a result of the alleged incident referred to in plaintiff's complaint, any such injury, loss, or

damage was a direct result of the course of the pre-existing condition with which the plaintiff's decedent was afflicted, and the care, or lack thereof, attendant to that condition.

FOR A TENTH, SEPARATE AND AFFIRMATIVE DEFENSE

The causes of action alleged in the complaint are pre-empted by the federal statutes and regulations that regulate Kariva, including but not limited to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 300 *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*

FOR AN ELEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE

At no time was Kariva defective or unreasonably dangerous.

FOR A TWELFTH, SEPARATE AND AFFIRMATIVE DEFENSE

Defendant's liability, if any, for non-economic damages is several rather than joint, and should be prorated according to Civil Code § 1431.2. Defendant shall be liable only for the amount of non-economic damages, if any, allocated to it in direct proportion to its percentage of fault, if any.

FOR A THIRTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE

Defendant is entitled to contribution from any person and/or entity whose negligence or other fault contributed to plaintiff's and/or her decedent's alleged injuries and damages if plaintiff should receive a verdict against defendant.

FOR A FOURTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE

The benefits of the design of Kariva outweigh the risk of danger, if any, inherent in the design, in light of all relevant factors.

FOR A FIFTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff is barred from recovering from defendant because independent, intervening, and/or superseding forces and/or actions of others caused or contributed to plaintiff's and/or her decedent's alleged losses and/or damages.

FOR A SIXTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff and/or her decedent failed to mitigate their damages, if any, despite full knowledge of them.

FOR A SEVENTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE

Defendant's liability, if any, will not result from its own conduct, but instead, will derive solely from an obligation imposed by law. As such, defendant is entitled to complete and total express and/or implied indemnity from other defendant(s) and/or others not yet party to this action.

FOR AN EIGHTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE

The complaint is subject to the limitations on the doctrine of product liability for a purported design defect and breach of warranty as set forth in the Restatement Second of Torts, Section 402A, comment k, and the decisions in *Brown v. Superior Court* (1988) 33 Cal.3d 1049; *Hufft v. Horowitz* (1992) 4 Cal.App.4th 8; and *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349.

FOR A NINTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiffs claims are barred by Sections 6(c) and (d) of the Restatement Third of Torts. Reasonable physicians knowing of the reasonably foreseeable risks and therapeutic benefits associated with Kariva would have prescribed and did pre-

scribe Kariva for classes of patients, and reasonable instructions and warnings regarding Kariva were provided to prescribing physicians.

FOR A TWENTIETH, SEPARATE AND AFFIRMATIVE DEFENSE

The complaint, and each of its causes of action, is barred by the applicable statute of limitations, including, without limitation, *Code of Civil Procedure* sections 335.1, 337, 338, 339, 340, and 343.

FOR A TWENTY-FIRST, SEPARATE AND AFFIRMATIVE DEFENSE

To the extent plaintiff's and/or her decedent's injuries and damages, if any, were related to Kariva, they were due to plaintiff's decedent's idiosyncratic reaction to Kariva for which defendant cannot be held responsible.

FOR A TWENTY-SECOND, SEPARATE AND AFFIRMATIVE DEFENSE

The design, manufacture, and distribution of Kariva complied with all applicable industry and governmental standards and regulations, and reflected the current state of the art at the time Kariva was designed, manufactured, sold, and distributed. Consequently, there can be no liability imposed against defendant.

FOR A TWENTY-THIRD, SEPARATE AND AFFIRMATIVE DEFENSE

If Kariva was involved in the alleged incident described in plaintiff's complaint, then, and in that event, Kariva was not defective in manufacture at the time of the manufacture and, therefore, the defendant is not liable.

FOR A TWENTY-FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE

Kariva has certain unavoidable, inherent characteristics which could not and cannot be obviated under the state of scientific knowledge at the time it was designed, tested, manufactured, labeled, and distributed to plaintiff and/or her decedent. If plaintiff and/or her decedent were injured and/or damaged as a result of the decedent's use of Kariva, those injuries or damages were the result of certain inherent characteristics associated with Kariva that could not be avoided without compromising the efficacy of Kariva.

FOR A TWENTY-FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff's complaint is equitably barred because plaintiff's failure to join all indispensable parties precludes the Court from granting complete relief to those who are parties to the action and will result in prejudice to defendant in future litigation.

FOR A TWENTY-SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff's complaint is precluded by actions and determinations of federal and state regulatory agencies, including without limitation, the Federal Food and Drug Administration.

FOR A TWENTY-SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE

If Kariva was involved in the incident alleged in plaintiff's complaint, then it modified, altered, misused, and abused by someone other than defendant prior to or at the time of the alleged use by plaintiffs decedent. Such modification, alteration, misuse, and/or abuse of Kariva was the sole legal cause of plaintiff's and/or her decedent's injuries and damages, if any.

FOR A TWENTY-EIGHTH, SEPARATE AND AFFIRMATIVE DEFENSE

To the extent that the facts and evidence learned through the investigation may warrant, plaintiff's claims are barred, reduced, and/or limited to applicable statutory and common law regarding limitations of awards, caps on recovery, and set-offs.

FOR A TWENTY-NINTH, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff's complaint should be dismissed for lack of standing.

FOR A THIRTIETH, SEPARATE AND AFFIRMATIVE DEFENSE

Venue may not be proper in this action.

FOR A THIRTY-FIRST, SEPARATE AND AFFIRMATIVE DEFENSE

Plaintiff's complaint should be dismissed pursuant to the doctrine of forum non conveniens.

FOR A THIRTY-SECOND, SEPARATE AND AFFIRMATIVE DEFENSE

Defendant asserts and does not waive any and all equitable and legal defenses, including but not limited to the doctrines of laches, res judicata, collateral estoppel, or unclean hands.

FOR A THIRTY-THIRD, SEPARATE AND AFFIRMATIVE DEFENSE

Defendant reserves the right to assert additional affirmative defenses as they became known during the course of this litigation, including without limitation any defenses raised by any other party.

WHEREFORE defendant Barr Laboratories, Inc. prays:

1. That plaintiff take nothing by her complaint;
2. That plaintiff's award, if any, be apportioned among all individuals or entities whose conduct contributed to the claimed injuries and damages;
3. For the costs of suit incurred herein;
4. For reasonable attorneys' fees; and
5. For such other and further relief as this court deems just and proper.

Dated: February 9, 2004

DRINKER BIDDLE & REATH LLP
/s/ Siobhan A. Cullen
Donald F. Zimmer, Jr.
Siobhan A. Cullen
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EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 03CV524 BTM (AJB)

SONJA HABERER, an individual and
CHAD HABERER, an individual,
Plaintiffs,

vs.

METABOLIFE INTERNATIONAL INC., a corporation;
METABOLIFE INTERNATIONAL LLC, a company;
GLOBAL METABOLIFE 356 LLC, a company;
WALMART STORES CORPORATION, a corporation, *et al.*,
Defendants.

ORDER DENYING MOTION TO REMAND

I. INTRODUCTION

Sonja Haberer ("Haberer") purchased a dietary supplement called Metabolife from a Wal-Mart store. On October 24, 2001, Haberer suffered a seizure allegedly after ingesting Metabolife. Haberer claims that Metabolife caused the seizure because it contains Ephedrine, an amphetamine-like stimulant that can have dangerous effects on the nervous system and the heart.

On February 27, 2003, Haberer filed a complaint in the Superior Court of California, County of San Diego, which named as defendants Metabolife International, Inc., the manufacturer and marketer of the product, other Metabolife-related

entities and individuals, and Wal-Mart as the retailer. Haberer is a resident of Texas. Metabolife is a California corporation with its principal place of business in San Diego, California. Wal-Mart is a Delaware corporation with its principal place of business in Arkansas. Both Metabolife and Wal-Mart conduct business across the country and extensively in California and the County of San Diego.

On March 17, 2003, prior to being formally served, Wal-Mart made a general appearance in the Superior Court by filing an answer. Concurrently, Wal-Mart filed a petition to remove the action to federal court. In its Petition, Wal-Mart stated that it waived service and was effecting removal based on this Court's diversity jurisdiction pursuant to 28 U.S.C. §§ 1441 and 1332. On April 17, 2003, Plaintiffs filed the instant motion to remand the action to state court. The party invoking the removal jurisdiction of federal courts, however, bears the burden of establishing federal jurisdiction over the state court suit. *See, Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). For the following reasons, the Court finds that Wal-Mart has met its burden and remand is inappropriate.

II. DISCUSSION

It is uncontested that complete diversity exists among the parties and that the amount in controversy exceeds $75,000. Plaintiffs contend, however, that removal was improper for several reasons: (1) it was premature because Plaintiffs' time to serve Defendants had not expired, (2) it was untimely since the period for removal only begins after a defendant is served, and (3) it circumvents the local defendant exception to the removal statute.

Plaintiffs' first theory, that removal was premature because their time to serve Defendants had yet to expire, is both novel and unpersuasive. *See*, Motion at 5 (stating that under San Diego Superior Court Local Rule 2.5, a plaintiff has 60 days

from the date the complaint is filed to formally serve the defendants). It is telling that Plaintiffs are unable to cite to any case authority that supports this proposition. Although caselaw cited for this motion by both parties is replete with instances where one defendant removed the case prior to the expiration of the time for service and in situations where other defendants had yet to be served, see discussion *infra*, none of these courts ever mentioned the possibility that a removal could be premature because the time to serve had not yet expired. In short, the Court finds this argument for remanding the action wholly unpersuasive.

Plaintiffs' second theory is that Defendant's removal was untimely because the statutory period for removal had not yet begun. According to Plaintiffs, "the removal period is triggered *only* when the defendant is properly served with a summons and complaint and thus subject to a court's jurisiction." Motion at 6-7. Plaintiffs' citation to Supreme Court precedent, however, is misleadingly selective. The Court in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354 (1999), did state that "if the complaint is filed in court prior to any service, the removal period runs from the service of the summons." This statement, however, was based on the principle that a court generally does not have jurisdiction over a party until that party is properly served. Therefore, in a case where a defendant has voluntarily subjected itself to the court's jurisdiction prior to formal service, such as this one, the aforementioned statement in *Murphy Brothers* does not apply. As the Supreme Court explained in that same opinion:

> in the absence of such service (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant . . . . Unless a named defendant agrees to waive service, the summons continues to function as the *sina qua non* di-

> recting an individual or entity to participate in a civil action . . . .

Murphy Brothers at 350.

In this case it is uncontested that Defendant Wal-Mart waived service and subjected itself to the state court's jurisdiction by making a general appearance and filing an answer. Therefore, Plaintiffs' reliance on *Murphy Brothers* is inapposite.

The real question is whether Wal-Mart's general appearance constituted "service" so as to trigger the beginning of the removal period. According to 28 U.S.C. § 1446(b), the "notice of removal of a civil action or proceeding shall be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief . . . ." In determining whether a general appearance constitutes "service" under the federal removal statute, the Court is required to look to state law. *See, Davis v. Cash*, 2001 WL 1149355, *2 (N.D. Texas) (stating that in diversity cases, courts "must look to state law in determining whether service is valid for removal purposes"). In *Davis*, the court found that under the Texas Rules of Civil Procedure an answer constituted an appearance of the defendant so as to dispense with the necessity of service upon him. *Id.*

Under the California Code of Civil Procedure a "general appearance by a party is equivalent to personal service of summons on such party." Cal. Civ. P. § 410.50. Accordingly, this Court finds that Wal-Mart's general appearance in state court was sufficient to constitute "service" under the federal removal statute and begin the running of the 30-day period for it to effect removal. Therefore, Defendant's removal was not untimely.

Plaintiffs' final argument is that removal was improper because it was a conscious attempt to evade the "no local

defendant" exception to removal. Under 28 U.S.C. § 1441(b), such an action "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." Defendant contends that removal was proper because the local defendant exception only applies, as the statute states, to defendants who are "properly joined and served." Accordingly, since the local defendant, Metabolife, Inc., was never served, the exception is simply not applicable.

Plaintiffs contend that in deciding whether to grant a motion to remand, courts have the discretion to consider unserved local defendants. In *Tarter v. United States Fidelity & Guaranty Co.*, 1992 U.S. Dist. LEXIS 18865, *5 (N.D. Cal.), the court stated that while "a resident defendant who has not been served 'may' be ignored in determining removability, no cases have held that remand 'must' be defeated because of lack of service at the time the removal petition is filed." Although the court in *Tater* did consider the domicile of the unserved local defendant in determining to remand the case to state court, Plaintiffs have cited no other case where a district court has similarly exercised this sort of "discretion."

In fact the vast majority of courts that have dealt with this specific issue have decided not to consider the domicile of an unserved local defendant in determining whether removal was proper. As one Circuit Court stated, "[w]here there is complete diversity of citizenship, . . . the inclusion of an unserved resident in the action does not defeat removal under 28 U.S.C. § 1441(b)." *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001); *See also, Republic Western Ins. Co. v. International Ins. Co.*, 765 F. Supp. 628, 629 (N.D. Cal. 1991) (stating that in cases where complete diversity exists, "a resident defendant who has not been served may be ignored in determining removability") (quoting 14B C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 3723, at 341 (2d Ed. 1985)); *In re Bridgestone/Firestone, Inc.*, 184 F.

Supp. 2d 826, 828 (S.D. Ind. 2002) (in case where complete diversity clearly existed, court held that "section 1441(b) would have precluded removal . . . only if [resident of forum state] had been properly served, and [since] it had not been served at the time Ford filed the removal petition," the case was removable).

The other cases that Plaintiffs cite in support of their position are wholly unpersuasive because they are either factually dissimilar, involve different legal issues, or both. In fact, these cases support Wal-Mart's position that removal was proper. *See, e.g., Recognition Communications, Inc. v. American Automobile Association, Inc.*, 1998 WL 119528, *3 (N.D. Tex.) (stating that "the citizenship of unserved defendants should generally not be considered when determining which defendants must join in a removal notice."); *Republic Western Ins. Co. v. International Ins. Co.*, 765 F. Supp. 628, 629 (N.D. Cal. 1991) (removal was proper because the local defendant had not been served); *Windac Corp. v. Clarke*, 530 F. Supp. 812, 813 (D. Neb. 1982) ("When a defendant has not been 'served,' however, within the meaning of the statute, citizenship in the forum state does not defeat removal jurisdiction.").

Accordingly, the Court finds that defendant Wal-Mart's removal of this action to federal court was proper.

III. CONCLUSION

For the aforementioned reasons, the Court DENIES Plaintiffs' motion to remand [doc. No 10-1]

IT IS SO ORDERED

Dated: July 22, 2003

/s/ Barry Ted Moskowitz
Honorable Barry Ted Moskowitz
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed MAR 4, 2004]

Case Number SACV04-0253 GLT

MEERA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA,
Plaintiff(s)

v.

OLINA HARWER, M.D., BARR LABORATORIES, INC., and DOES 1 through 100, Inclusive,
Defendant(s).

CERTIFICATION AND NOTICE OF INTERESTED PARTIES
(Local Rule 7.1-1)

TO: THE COURT AND ALL PARTIES APPEARING OF RECORD:

The undersigned, counsel of record for BARR LABORATORIES, INC. (or party appearing in pro per), certifies that the following listed party (or parties) has (have) a direct, pecuniary interest in the outcome of this case. These representations are made to enable the Court to evaluate possible disqualification or recusal. (Use additional sheet if necessary.)

PARTY	CONNECTION
(List the names of all such parties and identify their connection and interest.)	
Meera Samanta	Plaintiff
Barr Laboratories, Inc.	Defendant

Date: March 4, 2004

/s/ Siobhan A. Cullen

APPENDIX K

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

[Filed MAR 22, 2004]

Case No. SA CV 04-0253 GLT (ANx)
Date: March 18, 2004
Title: Merra Samanta v. Olina Harwer, et al.

PRESENT:

HON. Gary L. Taylor JUDGE

Lisa Bredahl	None Present
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None Present	None Present

PROCEEDINGS: ORDER TO SHOW CAUSE RE: REMOVAL [In Chambers]

On February 9, 2004, Defendant Barr Laboratories removed this action to federal court, invoking diversity jurisdiction. Defendant Barr Laboratories asserts it is incorporated in Delaware and its principle place of business is in New York. Plaintiffs are California citizens. Defendant Dr. Harwer is a California resident but has not been properly served.

> A nonresident defendant cannot remove a 'nonseparable' action if the citizenship of any codefendant, joined by the plaintiff in good faith, destroys complete diversity, regardless of service or nonservice upon the codefendant . . . . Whenever federal jurisdiction in a removal case

> depends upon complete diversity, the existence of diversity is determined from the fact of citizenship of the parties named and not from the fact of service.

Clarence E. Morris, Inc. v. Vitek, 412 F.2d 1174, 1176 (9th Cir. 1969) (citing *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939)).

Although Defendant Dr. Harwer has not been served or responded to the complaint, he remains a named defendant. Removal does not appear appropriate.

Defendant Barr Laboratories is ordered to show cause in writing not later than April 17, 2004, why this case should not be remanded back to state court.

INITIALS OF DEPUTY CLERK LB

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. SACV04-0253 GLT (ANx)

MERRA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA,

Plaintiff,

vs.

OLINA HARWER, M.D.; BARR LABORATORIES, INC.; and DOES 1 through 100, inclusive,

Defendants.

DEFENDANT'S RESPONSE TO THE ORDER TO SHOW CAUSE IN WRITING WHY REMOVAL IS APPROPRIATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[DECLARATION FILED CONCURRENTLY HEREWITH]

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA:

Defendant Barr Laboratories, Inc. ("Barr"), through its attorneys, Drinker Biddle & Reath LLP, hereby responds to the Court's March 18, 2004, Order requiring Barr to show cause in writing why removal is appropriate.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On March 4, 2003, Barr filed its Notice of removal pursuant to 28 U.S.C. § 1441. This is a civil action of which this

Court has original jurisdiction under 28 U.S.C. § 1332(a), in that the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs and it is between citizens of different states, when the citizenship of the fraudulently joined defendant is disregarded.

On March 18, 2004, the Court issued an Order to Show Cause in writing why removal is appropriate. In that Order, the Court quoted language from *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174, 1176 (9th Cir. 1969), indicating its interest in further briefing regarding why the case should not be remanded when plaintiff has named an unserved in-state defendant. Accordingly, this response addresses the fraudulent joinder of the in-state defendant. Jurisdictional facts regarding timing of the Notice of Removal pursuant to 28 U.S.C. § 1446 and the amount in controversy, addressed in the Notice of Removal, are not repeated but are incorporated herein.

II. STATEMENT OF FACTS

On November 13, 2003, plaintiff commenced an action in the Superior Court of the State of California for the County of Orange, captioned *Meera Samanta, individually, and as successors in interest to the estate of Parineeta Samanta, vs. Olina Harwer, MD., Barr Laboratories, Inc., and Does 1 through 100, Inclusive*, Case No. 03CC13673.

To the best of its knowledge, information, and belief, Barr Laboratories, Inc. ("Barr") first received a copy of the complaint and summons on January 12, 2004. (See Declaration of Siobhan Cullen, counsel for Barr ("Cullen Declaration"), attached as Exhibit A, ¶ 2.) On February 10, 2004, Barr filed its answer to the complaint.

According to plaintiff's complaint, decedent Parineeta Samanta was a resident of the State of California, and plaintiff Meera Samanta, individually and as successor in interest

to the Estate of Parineeta Samanta, is a resident of the State of California. (*See* Complaint, Exhibit B, ¶ 1.)

Barr Laboratories, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York.

Plaintiff's complaint states that Olina Harwer, M.D. ("Dr. Harwer") is licensed to practice in the State of California and provided care to decedent at her offices in Orange County, California. (Complaint, Exhibit B, ¶ 1.)

On February 24, 2004, counsel for Barr checked the docket in the state court action and learned that the plaintiff had not served Dr. Harwer, despite the requirements of Rule 201.7(b) of the California Rules of Court, which provides: "The complaint must be served on all named defendants and proofs of service on those defendants must be filed with the court within 60 days after the filing of the complaint. (See Cullen Declaration, Exhibit A, ¶ 3.) To the best of Barr's knowledge, information and belief, as of this date plaintiff still has not served Dr. Harwer, the only resident of California named as a defendant in plaintiff's complaint, with the Summons issued by the state court. Neither has plaintiff requested that a summons be issued by this Court for service upon Dr. Harwer. *Id.* ¶ 4.

Prior to removal, plaintiff did not file an application for a state court order extending the time to serve a pleading, as provided by the California Code of Procedure ("C.C.P.") Rule 201.7(e), nor is there any other evidence in the state court docket, the federal court docket, or elsewhere that plaintiff intends to serve Dr. Harwer. (See Cullen Declaration, Exhibit A, ¶ 5.) Furthermore, the state court on its own motion did not extend or otherwise modify the C.C.P. Rule 201.7 requirement that the complaint must be served on all named defendants and proofs of service on those defendants must be filed within 60 days after the filing of the complaint.

In checking the docket of the state court action on or about February 24, 2004, counsel for Barr also learned for the first time that Dr. Harwer has never answered plaintiff's complaint. *Id.* ¶ 6. Barr Laboratories, Inc., expected service of a responsive pleading by Dr. Harwer on approximately February 13, 2004, which would have been approximately 30 days from the last day on which plaintiff could have timely served Dr. Harwer, plus two days for mailing. Not until February 24, 2004, when counsel for Barr Laboratories, Inc., consulted the state court docket and learned that Dr. Harwer has never filed a responsive pleading, did Barr first ascertain that the case had become removable. At that time, it became evident that Dr. Harwer had never been served, plaintiff did not intend to proceed against her, and Dr. Harwer had been joined fraudulently to defeat diversity.

Complete diversity exists pursuant to 28 U.S.C. § 1441, as the presence of fraudulently joined defendant is not relevant for purposes of determining the existence of diversity jurisdiction. See *United Computer Systems, Inc. v. AT&T Corp.*, 298 F.3d 756, 762 (9th Cir. 2002). Dr. Harwer's California citizenship is, therefore, no bar to diversity jurisdiction.

The presence of Does 1 through 100 cannot defeat diversity, as 28 U.S.C. § 1441(a) provides: "For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded." To the best of Barr's knowledge, information and belief, no defendant other than Barr has been served with process. (See Cullen Declaration, Exhibit A, ¶ 7.) Accordingly, Barr was the only defendant in this action and no joinder in the removal petition was necessary.

III. LAW AND ARGUMENT

A. THE CITIZENSHIP OF THE RESIDENT DEFENDANT SHOULD BE DISREGARDED FOR DETERMING DIVERSITY JURISDICTION, AS PLAINTIFF HAS NO INTENTION OF SERVING HER AND HAS JOINED HER FRAUDULENTLY FOR THE PURPOSE OF DEFEATING FEDERAL DIVERSITY

The citizenship of a fraudulently joined defendant is not relevant for purposes of determining the existence of diversity jurisdiction. *See United Computer Systems, Inc. v. AT&T Corp.*, 298 F.3d 756, 762 (9th Cir. 2002) citing *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001) and *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). See also *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174, 1176 (9th Cir. 1969), cited in this Court's Order to Show Cause Regarding Removal (stating, "A nonresident defendant cannot remove a 'nonseparable' action if the citizenship of any codefendant, joined by the plaintiff in good faith, destroys complete diversity. . .") (emphasis added).

As this Court noted in its Order to Show Cause why removal in this action is appropriate, the mere fact that a resident defendant has not been served is not of itself sufficient to constitute fraudulent joinder in a nonseparable controversy. See *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174, 1176 (9th Cir. 1969) (citing *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939)). However, "where it appears that the plaintiff has no intention of serving the resident defendant [] and attempting to recover judgment against [her], the Court is justified in concluding, as a matter of fact, that [she was] joined in bad faith for the sole purpose of defeating Federal jurisdiction, and that, hence, the joinder is fraudulent." *Twentieth Century-Fox Film Corporation*, 129 F. Supp. 845, 848 (S.D. Cal. 1955) (finding plaintiffs statements in memo-

randum for setting trial filed in State court supported conclusion that defendants were joined for purpose of preventing federal jurisdiction). See also, e.g., *Johnson v. Scimed, Inc.*, 92 F. Supp.2d 587, 590 (W.D. La. 2000) (stating, "A party will be considered fraudulently joined—and removal will be permitted—when the plaintiff . . . does not intend to secure a judgment against that particular defendant." Citing Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3723, p. 631-36 (3d ed. 1998)); *Kohl v. American Home Products Corp.*, 78 F. Supp.2d 885, 889 (W.D. Ark. 1999).

Plaintiff clearly has no intention of prosecuting an action against Dr. Harwer, but rather has named her as a defendant for the fraudulent purpose of defeating Barr's right to have this case heard in federal court. Plaintiff's Complaint was filed over five months ago. Nevertheless, even in the face of Barr's removal petition, filed over a month ago on grounds of fraudulent joinder, plaintiff has continued to evince her lack of intention to serve Dr. Harwer. Plaintiff has neither served Dr. Harwer with the Summons issued by the state court on November 13, 2003, nor has she sought issuance of a summons from this Court for service upon Dr. Harwer. By the very language of Rule 4(m) of the Federal Rules of Civil Procedure, which requires service of a summons and complaint within 120 days of the filing of a complaint, plaintiff's action would now be subject to dismissal if the Complaint had been filed in federal court.

IV. CONCLUSION

All prerequisites for removal have been satisfied. Barr filed its Notice of Removal within 30 days of having first ascertained that this case is removable. Complete diversity exists as to the properly joined parties; and, as set forth in its notice of removal, the amount in controversy exceeds Seventy-Five Thousand Dollars ($75,000.00), exclusive of interest and costs.

If any additional question arises as to the propriety of the removal of this action, Barr requests the opportunity to present a supplemental brief, limited discovery, and/or oral arguments in support of its position that this case is properly removed.

For the foregoing reasons, defendant Barr Laboratories, Inc., hereby respectfully submits that removal of this action was appropriate, and that the case should not be remanded to the Superior Court of the State of California for the County of Orange.

DATED: April 15, 2004

DRINKER BIDDLE & REATH LLP

By: /s/ Siobhan A. Cullen
DONALD F. ZIMMER, JR.
SIOBHAN A. CULLEN
Attorneys for Defendant
BARR LABORATORIES, INC.

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. SACV04-0253 GLT (ANx)

MERRA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA,

Plaintiff,

vs.

OLINA HARWER, M.D.; BARR LABORATORIES, INC.; and DOES 1 through 100, inclusive,

Defendants.

DECLARATION OF SIOBHAN A. CULLEN IN SUPPORT OF DEFENDANT'S RESPONSE TO THE ORDER TO SHOW CAUSE IN WRITING WHY REMOVAL IS APPROPRIATE

[MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; AND DECLARATION FILED CONCURRENTLY HEREWITH]

I, Siobhan A. Cullen, declare as follows:

1. I am an attorney at the law firm of Drinker Biddle & Reath LLP, counsel of record for defendant Barr Laboratories, Inc. ("Barr"). I am a member in good standing of the State Bar of California. I have personal knowledge of the facts set forth in this Declaration and, if called as a witness, could and would testify competently to such facts under oath.

2. To the best of its information and belief, Barr first received a copy of the complaint and summons at its offices in Pomona, New York on January 12, 2004.

3. On February 24, 2004, I checked the docket in the state court action and learned that the in pro per plaintiff had not served Dr. Harwer, despite the requirements of Rule 201.7(b) of the California Rules of Court.

4. To the best of my information and belief, as of this date plaintiff still has not served Dr. Harwer, the only resident of California named as a defendant in plaintiffs complaint. Neither has plaintiff requested that a summons be issued by this Court for service upon Dr. Harwer. Copies of both the state and federal court dockets regarding this action are attached hereto as Exhibit 1.

5. Plaintiff did not file an application for a court order extending the time to serve a pleading, as provided by the California Code of Procedure Rule 201.7(e), nor is there any other evidence in the docket or elsewhere that plaintiff intends to serve Dr. Harwer.

6. When checking the docket of the state court action on or about February 24, 2004, I also learned for the first time that Dr. Harwer has never answered plaintiffs complaint.

7. To the best of my knowledge, information, and belief, no defendant other than Barr has been served with process in this action.

Executed on April 15, 2004 at San Diego, California.

/s/ Siobhan A. Cullen
SIOBHAN A. CULLEN

EXHIBIT 1

U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(Southern Division—Santa Ana)

Civil Docket for Case #: 8:04cv00253

MERRA SAMANTA, individually, and as successors in interest to the estate of PARINEETA SAMANTA,

Plaintiff,

vs.

OLINA HARWER, M.D.; BARR LABORATORIES, INC.; and DOES 1 through 100, inclusive,

Defendants.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
03/04/2004	1	NOTICE OF REMOVAL by defendant Barr Laboratories, Inc from Superior Court of CA, County of Orange [Case Number 03CC13673] with copy of summons and complaint. Case assigned to Judge Gary L. Taylor, Discovery to Magistrate Judge Arthur Nakazato (Filing fee $ 150). (kks) (Entered: 03/10/2004)
03/04/2004		ANSWER filed by defendant Barr Laboratories, Inc. (kks) (Entered: 03/10/2004)
03/04/2004	2	CERTIFICATION AND NOTICE of Interested Parties filed by Defendant Barr Laboratories, Inc. (kks) (Entered: 03/10/2004)

DATE	NO.	PROCEEDINGS
03/05/2004	4	NOTICE to adverse party of removal of civil action to USDC filed by defendant Barr Laboratories, Inc. (dmjr,) (Entered: 03/12/2004)
03/05/2004	5	PROOF OF SERVICE filed by defendant Barr Laboratories, Inc. re [4] Notice, Civil Cover Sheet; Certification and Notice of Interested Parties (see document for details) was served on 03/05/04. (1n,) (Entered: 03/17/2004)
03/11/2004	3	ORDER by Judge Gary L. Taylor re: early meeting of parties, Set/Reset Hearings: Scheduling Conference set for 5/17/2004 09:00 AM before Honorable Gary L. Taylor. (dmjr,) (Entered: 03/11/2004)
03/12/2004	6	AMENDED DOCUMENT filed by Defendant Barr Laboratories, Inc. Amendment to Notice (Other)[4] (dmjr,) (Entered: 03/19/2004)
03/18/2004	7	MINUTES OF In Chambers before Judge Gary L. Taylor: Defendant Barr Laboratories is Ordered to Show Cause in writing not later than 4/17/2004 why this case should not be remanded back to state court. Court Reporter: None Present (mt,) (Entered: 03/22/2004)
03/24/2004	8	APPLICATION AND ORDER of Non-Resident Attorney to Appear in a Specific Case by Joseph P Thomas for Barr Laboratories, Inc, designating Siobhan A Cullen as local counsel. Fee paid. Approved by Judge Gary L. Taylor. (dmjr,) (Entered: 03/25/2004)

DATE	NO.	PROCEEDINGS
03/24/2004	9	APPLICATION AND ORDER of Non-Resident Attorney to Appear in a Specific Case by Karen Imbus for Barr Laboratories, Inc, designating Siobhan A Cullen as local counsel. Fee paid. Approved by Judge Gary L. Taylor. (dmjr,) (Entered: 03/25/2004)